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No. 972.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THEODORE C. McBRIDE,
Petitioner,

vs.

TOLEDO TERMINAL RAILROAD COMPANY,
Respondent.

MOTION

C. RICHARD GRIESER,
8 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner, Theodore C. McBride.

SHUMAKER, LOOP & KENDRICK,
ROBERT B. GOSLINE,
JOHN W. HACKETT, JR.,
240 Huron St., Toledo 4, Ohio,
Attorneys for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

INDEX

Motion 1

Brief in support of motion 4

Appendix A—Mandate from the United States Supreme Court 8

Appendix B—Application recalling mandate and entry denying same 11

Table of Cases

Boudin v. Tyke Bros. S. S. Co., 350 U. S., 811 4

Cahill v. N. Y., N. H. & H. R. Co., 351 U. S., 183 4

Givens v. Missouri, Kansas and Texas R. Co. of Texas, 196 Fed. 2d, 905 7

In Re Potts, Petitioner, 166 U. S., 263 6

Rogers v. Missouri-Pacific R. Co., 352 U. S., 500 6

Statute Cited

Ohio Revised Code, Section 2323.181 7

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MOTION

Petitioner, Theodore C. McBride, moves this court for an order to recall and clarify the mandate issued herein by this court to the Supreme Court of Ohio on October 16, 1957, for the reason that the Ohio Supreme Court has interpreted said mandate and this court's order and judgment on the merits on June 24, 1957, to authorize a new trial on the ground that the verdict and judgment thereon are contrary to the law and evidence, whereas petitioner says that said order and judgment of this court should be interpreted so as to reinstate and enter the original judgment for petitioner against respondent in the amount of $51,000.00 and costs with interest from January 18, 1955; and petitioner respectfully requests that said mandate of this court be clarified accordingly.

Proceedings in the Ohio Supreme Court subsequent to this court's order and judgment of June 24, 1957, are appended hereto as Appendix A and Appendix B. Petitioner also refers the court to the record filed herein with his petition for certiorari and to the petition itself, particularly question number four of the questions presented for review (petition, pages 3 and 4) and the argument thereon (petition, pages 26-28, inclusive).

Petitioner says that the Ohio Supreme Court, after receiving this court's mandate, issued a mandate on October 22, 1957, to the Court of Common Pleas of Lucas county, Ohio (the trial court), by which mandate judgment for respondent was reversed, but the cause was remanded for a new trial (Appendix A). Petitioner's application in the Ohio Supreme Court for an order to recall that court's mandate and to issue a mandate directing judgment for petitioner, as aforesaid, was denied on November 12, 1957 (Appendix B).

Petitioner further says that a dispute over the interpretation of this court's judgment and mandate has arisen in that the mandate of the Ohio Supreme Court authorizes a new trial upon the sole ground (as found in the entry by the trial court, R. 13) that "the verdict and judgment entered on said verdict were contrary to law and the evidence"; whereas petitioner interprets this court's judgment and order on the merits to constitute the necessary holding that the verdict and judgment were *not* contrary to the law and evidence.

Petitioner further says that a clarified mandate from this court is necessary and desirable in the interest of justice and fairness in order to resolve said conflict over the interpretation of this court's order and judgment.

Petitioner further claims that an explicit mandate directing judgment for petitioner will be a correct interpretation of this court's order and judgment and will avoid a new trial upon the very ground which petitioner says this court has set aside in its order and adjudication on the merits.

Respectfully submitted,

C. RICHARD GRIESER,

Attorney for Petitioner, Theodore C. McBride.

BRIEF IN SUPPORT OF MOTION

The procedure of this motion is authorized by the decision of this court in *Cahill v. N. Y., N. H. & H. R. Co.*, 351 U. S., 183. See also *Boudoin v. Tyke Bros. S. S. Co.*, 350 U. S., 811.

The decision in *Cahill* went far beyond petitioner's request in the instant motion. In the former the respondent railroad sought and obtained a mandate so changed that the result was the vacation of a previously entered final judgment for petitioner in accordance with this court's judgment on the merits and a remand to the Court of Appeals for consideration of a matter of the admissibility of certain evidence. By contrast petitioner herein seeks only a clarified and explicit mandate consistent with the judgment rendered on the merits. Petitioner's aim is not to upset a final judgment and reopen the litigation but rather to obtain a final judgment and avoid a new trial contrary to the order and judgment of this court, thereby terminating senseless litigation.

A brief review of the procedural history and holdings of the various courts will confirm the foregoing. On January 18, 1955, judgment was entered on the verdict in favor of petitioner for $51,000.00 in the Court of Common Pleas of Lucas county, Ohio (R. 12). On April 27, 1955, respondent was granted final judgment on its motion (R. 12). On June 22, 1955, the trial court granted the respondent a new trial only in the event of the reversal of the previously entered judgment for respondent. The sole basis for the order conditionally granting the new trial, as shown by the entry, was that "the verdict and judgment entered on said verdict are contrary to law and the evidence." (R. 13) The

trial court confirmed this beyond doubt by his statement at the hearing on the entry concerning the motion for new trial. At the outset he stated (R. 257):

> "The Court: I might as well try to make it clear right now. I am still of the opinion that there was no negligence shown on the part of the defendant, The Toledo Terminal Railroad Company, and if there was any evidence of negligence on the part of the Railroad Company, I am still of the opinion that that negligence, if any, was not the proximate cause of the injury sustained or claimed by the plaintiff. *I think that is all I had in mind when I ruled on the motion for new trial.*" (Emphasis supplied)

Subsequently at the same hearing the court re-emphasized the only basis for his conditional granting of the new trial (R. 263):

> "Therefore, the only thing in my mind is why should I grant a motion for a new trial when I am of the opinion that the case was well tried, it was finally presented and in the end I would have to say that they are entitled to a new trial because in my opinion there was no actionable negligence against the Railroad Company, and if there wasn't (was) any evidence of negligence in the case I could not see any causal relation between the plaintiff's negligence and the injury sustained by the plaintiff."

The Court of Appeals for Lucas county, Ohio, reversed the final judgment for respondent (R. 275) but refused to review or reverse the order conditionally granting respondent a new trial (R. 278). On February 6, 1957, the Ohio Supreme Court reversed the Court of Appeals and entered judgment for respondent (R. 282). The Ohio Supreme Court in its opinion (R. 290-294; Appendix C, petition for certiorari) held basically that the evidence did not justify a reasonable conclusion that respondent's negligence proximately caused petitioner's injuries. The court

also approved the trial court's granting of the conditional new trial under the Ohio statutes. In short, the Supreme Court of Ohio reversed the Court of Appeals and affirmed the trial court in both the matter of rendering judgment for respondent and of conditionally granting the new trial. The Ohio Supreme Court, accordingly, affirmed the judgment of the trial court (Appendix A, page 8).

This court on June 24, 1957, entered the following order:

> "The petition for writ of certiorari is granted, and the judgment of the Supreme Court of Ohio is reversed and the cause is remanded. Rogers v. Missouri-Pacific R. Co., 352 U. S. 500 (1957)."

The foregoing order, which was incorporated into the mandate, was not in part a reversal and in part an affirmance of the decision of the Supreme Court of Ohio; it was a complete reversal thereof, including a reversal of that court's decision approving the conditional granting of the new trial.

The reversal of the Ohio Supreme Court, petioner submits, furthermore, necessarily compels the holding that there was sufficient evidence to support the jury's finding of negligence and causation. The verdict and judgment for petitioner, therefore, were *not* contrary to law and the evidence. The only basis for the new trial has been adjudicated and eradicated by this court.

A mandate authorizing a new trial upon that same and only ground, therefore, should not be sanctioned by and is not in conformity with the judgment and decree of this court. That issue cannot be relitigated. This court stated in the case of *In re Potts, Petitioner*, 166 U. S., 263, at page 265:

> "* * * When a case has once been decided by this Court on appeal and remanded to the Circuit Court whatever was before this Court, and disposed of by its decree, is considered as finally settled. * * *"

The question of the validity of the new trial upon the sole ground found by the trial court was before this court

on the petition for certiorari. (Question Number 4) That issue, we submit, was settled in favor of petitioner, for the holding that there was sufficient evidence to justify a reasonable conclusion that respondent's negligence played some part in producing petitioner's injuries (*Rogers v. Missouri-Pacific R. Co.*, 352 U. S., 500) necessarily includes the opposite proposition that the verdict and judgment are not contrary to the law and evidence.

The granting of the new trial upon the trial court's overruled basis cannot be justified by the Ohio statute (Ohio Revised Code, Section 2323.181, set forth at pages 63 and 64 of petition for certiorari). That statute does not *require* that a new trial be granted conditionally after sustaining a motion for judgment; it only requires that the motion for new trial be considered and decided. Certainly it does not authorize a conditional new trial upon a ground which has been overruled by a higher court.

Indeed, the trial court could not consistently grant respondent's motion for judgment and yet grant respondent a new trial upon the same basis in the same record, for the former denies a cause of action, whereas the latter concedes the existence of a cause of action.

Petitioner's position, therefore, is that this court's reversal of the Ohio Supreme Court's judgment for respondent affirmed the original judgment for petitioner and denied the ground upon which the conditional new trial had been based. This court should clarify its mandate accordingly, and the original judgment should be restored as of the date of its entry, January 18, 1955. *Givens v. Missouri, Kansas and Texas R. Co. of Texas*, 196 Fed. 2d, 905 (5th Circuit, 1952).

Respectfully submitted,

C. Richard Grieser,
8 East Broad St., Columbus 15, Ohio,
Attorney for Petitioner, Theodore C. McBride.

APPENDIX A

The Supreme Court of the State of Ohio, of the Term of January, A. D. 1957 To-wit: October 22, 1957

This day this cause came on for consideration on the mandate of the Supreme Court of the United States received and filed herein October 18, 1957, reversing the judgment of this court and remanding the cause to this court, said mandate being in the words and figures following, to-wit:

"United States of America, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Whereas, lately in the Supreme Court of the State of Ohio before you, or some of you, in a cause between Theodore C. McBride, plaintiff-appellee, and Toledo Terminal Railroad Company, defendant-appellant, No. 34783, wherein the judgment of said Supreme Court duly entered on the 6th day of February A. D. 1957 is in the following words, viz.:

> 'This cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same hereby is, reversed for the reasons stated in the opinion filed herein; and this Court proceeding to render the judgment that the Court of Appeals should have rendered, it is ordered and adjudged that the judgment of the Court of Common Pleas be and the same hereby is, affirmed.
>
> It is further ordered and adjudged that appellant recover from appellee its costs expended in this Court and in the Court of Appeals taxed at $.....

> Ordered, that a special mandate be sent to the Court of Common Pleas of Lucas County, Ohio, to carry this judgment into execution.
>
> Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Lucas County, "for entry".'

as by the inspection of the transcript of the record of the said Supreme Court, which was brought into the Supreme Court of the United States by virtue of a writ of certiorari, agreeably to the act of Congress, in such case made and provided, fully and at large appears.

And whereas, in the present term of October, in the year of our Lord one thousand nine hundred and fifty-six, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record, and was duly submitted.

"On consideration whereof, it is ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, reversed with costs.

It is further ordered that Theodore C. McBride recover from Toledo Terminal Railroad Company, one hundred dollars ($100) for his costs herein expended and have execution therefor.

It is further ordered that this cause be, and the same is hereby remanded to the Supreme Court of Ohio. Rogers v. Missouri-Pacific R. Co., 352 U. S. 500 (1957).

June 24, 1957.

And the same is hereby remanded to you, the said judge of the said Supreme Court of the State of Ohio, in order that such execution and proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated as, according to right and justice, and the Constitution and laws of the United States, ought to be had therein, the said writ notwithstanding.

Witness the Honorable Earl Warren, Chief Justice of the United States, the sixteenth day of October, in the year of our Lord one thousand nine hundred and fifty-seven.

(Costs omitted)*

John T. Fey
Clerk of the Supreme Court of the United States
By E. P. Cullinan
Deputy."

Journal Entry
(Filed October 18, 1957)

Thereupon this cause came on to be heard upon the transcript of the record of the Court of Appeals of Lucas county and upon the opinion of the Supreme Court of the United States. On consideration whereof, it is ordered and adjudged by this court, that the judgment of reversal of the Court of Appeals entered herein on February 6, 1957 (Journal No. 42, page 248) be vacated and set aside and it is now hereby ordered and adjudged that the judgment of the Court of Appeals be and the same hereby is affirmed for the reasons set forth in the opinion of the Supreme Court of the United States in this case.

It is further ordered and adjudged that appellee Theodore C. McBride recover from appellant Toledo Terminal Railroad Company, his costs as taxed on the mandate from the Supreme Court of the United States and it is further ordered that all other court costs including the cost of bill of exceptions shall abide the final judgment in this case.

Ordered, that a special mandate be sent to the Court of Common Pleas of Lucas county, to carry this judgment into execution.

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* The judgment of the Court of Appeals reversed the judgment for respondent and remanded the cause to the Court of Common Pleas for a new trial (R., 275, 276).

Ordered, that a copy of this entry be certified to the clerk of the Court of Appeals of Lucas county, for entry.

I, Elliot E. Welch, clerk of the Supreme Court of Ohio, do hereby certify that the foregoing entry is truly taken and copied from the Journal of said court.

Witness my hand and the seal of said court, this twenty-second day of October A. D. 1957.

Elliot E. Welch, Clerk.

To the Honorable Court of Common Pleas, Within and For the County of Lucas, Toledo, Ohio, Greeting:

We do hereby command you, that you proceed, without delay, to carry the within foregoing judgment of our Supreme Court of Ohio in the case of Theodore McBride, plaintiff-appellee vs. Toledo Terminal Railroad Co., defendant-appellant, into execution.

Witness, Elliot E. Welch, clerk of our said Supreme Court of Ohio, at Columbus, this 22nd day of October, 1957.

Elliot E. Welch, Clerk.

APPENDIX B

IN THE SUPREME COURT OF OHIO

Application of Plaintiff-Appellee

Plaintiff-appellee, Theodore C. McBride, makes application to the court for an order recalling the mandate issued herein to the lower court and in lieu thereof issue a new mandate to the lower courts directing the Court of Common Pleas of Lucas county, Ohio, to enter judgment for plaintiff in the amount of $51,000.00 and costs with interest as provided by law from January 18, 1955.

ENTRY

(Dated November 12, 1957)

It is ordered by the court that the application of plaintiff-appellee for the recall of the mandate, issued herein to the Court of Common Pleas of Lucas county, be and the same hereby is, denied.